IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22184

JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign
corporation,

Defendant and Third Party
Plaintiff-Appellant,

v.

WAYNE CRAWFORD,

Plaintiff-Appellee,

BRADY HAMILTON STEVEDORE
COMPANY, a corporation,

Third Party Defendant-
Appellee.

FILED
DEC 18 1967
WM. B. LUCK CLERK

APPELLANT'S BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon.

THE HONORABLE ROBERT C. BELLONI, Judge

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JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign
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Appellee

APPELLANT'S BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon.
THE HONORABLE ROBERT C. BELLONI, Judge

STATEMENT OF JURISDICTION

This action was filed on October 4, 1966, in the United States District Court for the District of Oregon (R.[1] 1). As set forth in the complaint (R. 1), and answer (R. 3) and the pretrial order (R. 12), diversity of citizenship existed between the parties and the amount in controversy exceeded $10,000, exclusive of interest and costs. Accordingly, the jurisdiction of the District

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[1] The Clerk's record is referred to herein as "R." The reporter's transcript is referred to as "Tr."

No. [illegible]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[illegible] AND [illegible]
[illegible], INC., a [illegible]
corporation,

Defendant and Third-Party
Plaintiff-Appellant,

vs.

[illegible],

Plaintiff-Appellee,

BRADY-HAMILTON STEVEDORE
COMPANY, a corporation,

Third-Party Defendant-
Appellee.

APPELLANT'S BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon,
[illegible]

STATEMENT OF JURISDICTION

This action was filed on [illegible], 195[illegible], in the United States District Court for the District of Oregon (R. 1). [illegible] (R. [illegible]) and answer (R. 9) and the third-party [illegible] (R. [illegible]). [illegible] of citizenship exists between the parties and the amount in controversy exceeds $10,000, exclusive of interest and costs. Accordingly, the jurisdiction of the district

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[1] The [illegible] is [illegible]
[illegible]

Court was properly invoked under the provisions of 28 USCA, Section 1332.

The action was tried before the Honorable Robert C. Belloni, sitting with a jury, on June 13 and 14, 1967. The jury returned its verdict in favor of plaintiff-appellee and against defendant-appellant, and against defendant-appellant and in favor of third party defendant-appellee, whereupon the District Court entered its judgment based upon the verdicts on June 14, 1967 (R. 85).

Defendant-appellant filed a motion for judgment n.o.v. and for a new trial on June 26, 1967 (R. 86), which was denied by order of the District Court dated July 10, 1967 (R. 93). Defendant-appellant filed notice of appeal on August 8, 1967 (R. 95), within the time allowed by Rule 73(a), Federal Rules of Civil Procedure.

By reason of the foregoing, this court has jurisdiction to review the judgment of the District Court under the provisions of 28 USCA, Section 1291.

STATEMENT OF THE CASE

A. Nature of the Action

This is an action brought by Wayne Crawford ("plaintiff,") a longshoreman, against Judith Ann Liberian Transport Corporation, Ltd. ("Shipowner,") owner of the vessel JUDITH ANN, for personal injuries allegedly sustained by plaintiff while engaged in the discharge of cargo

court was [illegible] under the presidency of [illegible], [illegible] (195[illegible]).

The action was [illegible] before the [illegible] [illegible] [illegible], [illegible] [illegible], on [illegible] and [illegible], 195[illegible]. [illegible]

[illegible]

[illegible]

[illegible] [illegible]

4. [illegible]

[illegible]

from the vessel at Portland, Oregon, on May 3, 1966. Plaintiff's claim against Shipowner is based upon the alleged unseaworthiness of the vessel in certain specified particulars (R. 13).

Shipowner denied that it was liable to plaintiff, and impleaded Brady-Hamilton Stevedore Company ("Stevedore,") asserting a right to indemnity for any liability that might accrue against Shipowner by reason of plaintiff's claim. Shipowner's indemnity claim is predicated upon the proposition that if it is liable to plaintiff on account of its vessel's being unseaworthy, as charged by plaintiff, such unseaworthy condition was either created by or fully known to Stevedore, which nevertheless failed to stop work or remedy such condition and, in fact, brought the same into play so as to cause plaintiff's injury (R. 15).

B. Summary of Facts

On May 3, 1966, plaintiff was employed as a longshoreman aboard the vessel JUDITH ANN, which was berthed at Portland, Oregon (R. 12). Plaintiff was in the employ of Stevedore, a master stevedore company, and was engaged with his fellow longshoremen in discharging cargo under the express direction and control of Stevedore (R. 12). Stevedore's activities in connection with the discharge of the vessel were being

performed pursuant to a written contract with the charterer of the vessel (R. 12, 13; Ex. 31).

Plaintiff was working in a longshoreman gang which was discharging a cargo of steel reinforcing bars (rebars) from the lower hold at No. 4 hatch (Tr. 51, 58). The steel bars were in bundles and were approximately twenty feet long (Tr. 59). In order to remove the bundles of steel bars, the longshoremen were using a cradle-type "pickup" sling (Tr. 79). This sling was inserted under one end of the load, which was then raised by means of a dockside crane (Tr. 79). At the time of the plaintiff's accident, one end of a load of steel bars had been so hoisted--approximately three feet high--and the load stopped (Tr. 62, 79), either for the purpose of then putting a regular loading sling around the load, as testified to by some of the witnesses (Tr. 60, 79, 123), or of placing a 4 x 4 timber under the load, which one of the witnesses testified the plaintiff was attempting to do when the accident occurred (Tr. 213, 214).

At this point, the load, or a portion of it, slipped out of the pickup sling and one or more of the bundles lit on a 4 x 4 piece of dunnage which struck the plaintiff on the head, causing the injuries complained of (Tr. 63, 66, 80, 117, 213, 214).

C. Nature of Judgment

The jury returned its verdict in favor of plaintiff and against Shipowner in the sum of $194,058.55 and the District Court entered judgment accordingly. The District Court likewise entered judgment in favor of Stevedore on Shipowner's indemnity claim, pursuant to the jury's verdict.

D. Questions Presented on Appeal

Shipowner, by this appeal, raises questions relating both to the trial of the plaintiff's injury claim against it and to the trial of its indemnity claim against Stevedore.

With respect to the plaintiff's claim, the questions presented concern the propriety of the District Court's action in giving certain of the plaintiff's requested instructions, and in refusing to give certain instructions requested by Shipowner.

With respect to Shipowner's indemnity claim, this appeal presents the question of whether the trial court erred in failing to direct a verdict in favor of Shipowner on this issue. Additionally, error is asserted in connection with the trial court's failure to give certain nstructions requested by Shipowner and in failing to submit to the jury a special verdict form to delineate the factual ssues to be determined.

SPECIFICATIONS OF ERROR

A. Plaintiff's claim against Shipowner:

1. The District Court erred in giving plaintiff's Requested Instruction No. 7, as follows:

> "I instruct you that the shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended. This liability extends to longshoremen who work aboard the vessel and employ contracting stevedore companies. Even if the owner engaged others, such as the stevedore companies who supply equipment necessary for stevedoring operations, he must still answer to a longshoreman if the gear proves to be unseaworthy.
>
> "I further instruct you that if the injuries to the plaintiff were caused by some malfunctioning in the rigging used for unloading the vessel or by some defect in the equipment used, or if there was improper use of the equipment by other longshoremen, the shipowner would be liable to the plaintiff for unseaworthiness. The obligation of providing seaworthy equipment is absolute and extends to all loading or unloading equipment used on the vessel." (Tr. 278-279).

Counsel for Shipowner duly excepted to the giving of this instruction, as follows:

> "I will also object to the giving of Plaintiff's Requested Instruction No. 7, and with particular reference to the second paragraph in which you instructed, 'If the injuries to plaintiff were caused by some malfunction in the rigging used for loading the vessel or by some defect in the equipment used.' I think 'loading the vessel' is a typographical error, and I am not sure if I followed you close enough to see if you interpolated unloading or not. But in any event, there is no evidence to the effect that there is any malfunctioning in the rigging." (Tr. 298).

2. The District Court erred in giving plaintiff's

> "You are instructed that the duties imposed upon the shipowners and the law in respect to the safety of employees are nondelegable; that is to say, the employer cannot delegate the performance of those duties to any other agent or employee. The defendant in this case cannot absolve itself of the performance of those duties, nor could it delegate the performance of them to employees, to the stevedore company, nor to anyone else, but they adhere to the defendant shipowner without the possibility of suspension or interruption." (Tr. 279).

Counsel for Shipowner duly excepted to the giving of this instruction, as follows:

> "I also take exception to Plaintiff's Requested Instruction No. 8 in which it is stated that, "The duties imposed upon the shipowner and the law with respect to the safety of employees is nondelegable.' This is true, but then you went on to say, 'The employer cannot delegate the performance of those duties to any agent or employee.' I take exception to this. The employer can delegate the performance. He cannot rid himself of the obligation, but the ship certainly can go into port and hire a stevedore to accomplish the performance of the duties." (Tr. 298).

3. and 4. The District Court erred in failing to give Shipowner's Requested Instructions No. 24 and No. 25, respectively, as follows:

No. 24. "The plaintiff contends in this case that the ship was unseaworthy because of improper stowage of cargo. I instruct you that the method or manner of cargo stowage renders a vessel unseaworthy only when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo. The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the

> vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work." (R. 72).

No. 25. "I instruct you that the fact that cargo is stowed in such a manner as to require the use of a pick-up sling in order to discharge it does not render the vessel unseaworthy." (R. 73).

Counsel for Shipowner duly excepted to the court's failure to give these requested instructions, as follows:

> "/I also except, your Honor, to the/ * * * failure to give Nos. 24, 25, and 26. Now, the only reason I requested 26 was to point out to the jury that the law regarding the extension of the obligation of seaworthiness does not extend to the stevedore company, although it does to the longshoremen." (Tr. 299-300).

B. Shipowner's indemnity claim against Stevedore:

1. The District Court erred in failing to grant Shipowner's motion for a directed verdict on its indemnity claim against Stevedore and in denying its motion for judgment n.o.v. made following the entry of judgment.

At the close of the evidence, counsel for Shipowner orally moved for a directed verdict against Stevedore, as follows:

> "Mr. Carlsen: * * * I hope maybe we can alleviate that right now, your Honor, with my motion for a directed verdict against the stevedore.
>
> "I think as a matter of law that there is no question under all the facts presented here that a directed verdict must be presented, and maybe we could eliminate the necessity of submitting that aspect of it to the jury.
>
> "The Court: Do you have anything to say other than what you said in your defendant's memorandum

> on the indemnity claim? This is your argument, isn't it? /The memorandum referred to by the court appears in the record, R. 21-27./
>
> "Mr. Carlsen: Yes, your Honor, plus--the law in the memorandum, plus it is clear that there was knowledge of the condition on the part of the stevedore prior to the time. There is no question about the fact that if unseaworthiness is found, that unseaworthy condition was brought into play by the stevedore. There is no question also that if it is found that the sling used was improper, then that sling was furnished by the stevedore. * * *. (Tr. 256-257).
>
> - - -
>
> "The Court: The defendant's memorandum on this indemnity claim goes on for six pages and states the law, and I think it states it accurately, and then it makes this huge leap as a conclusion: 'Based upon the principles set forth above, defendant respectfully urges that it is entitled to indemnity against third party defendant as a matter of law.' But it goes on for six pages and doesn't require that conclusion. I can't find a single case which you have cited--and I read them--which says anything about the third party defendant being liable without fault.
>
> "Mr. Carlsen: Well, your Honor, the fault is continuing to work when the stevedore was in possession of knowledge that continuing to work might create a dangerous condition. (Tr. 259-260).
>
> "The Court: Well, that motion is denied." (Tr. 261).

Additionally, Shipowner requested an instruction which, by its terms, directed a verdict in favor of Shipowner against Stevedore on the indemnity issue. This was Shipowner's Requested Instruction No. 17, as follows:

> "I instruct you that, under the evidence presented in this case, the defendant vessel owner is entitled to indemnity against the third party defendant stevedore company for any liability you may find the defendant has to the plaintiff in this case. Accordingly, if you return your

> verdict in favor of the plaintiff, you shall likewise return your verdict, in an identical amount, in favor of the defendant and against the third party defendant." (R. 65).

Counsel for Shipowner duly excepted to the court's failure to give this instruction:

> "I also except, your Honor, to the failure of the Court to give our Requested Instruction No. 17, which requires a directed verdict against the third party. * * *" (Tr. 299).

Following the entry of judgment upon the verdict, Shipowner filed its motion, as against Stevedore, for judgment n.o.v. in accordance with its motion for a directed verdict (R. 87-89). This motion was denied by order of the District Court dated July 10, 1967 (R. 93).

2., 3., 4. and 5. The District Court erred in failing to give Shipowner's Requested Instructions Nos. 18, 19, 21 and 22, respectively, as follows:

No. 18. "I instruct you that it is undisputed in this case that the pick-up sling being used by the stevedore company at the time of the plaintiff's accident was furnished and provided by the stevedore company. I further instruct you that, for purposes of this case, the stevedore company is charged with knowledge of the condition of this pick-up sling. If you find, under the instructions I have given you, that the plaintiff is entitled to recover against the defendant vessel owner because this pick-up sling was inadequate or unsafe, in not being equipped with a hook or other securing device to keep it from slipping, then I instruct you that the vessel owner is entitled to indemnity from the stevedore company as a matter of law and you will return your verdict accordingly." (R. 66).

No. 19. "If you find, under the instructions I have

> maritime or other, of the plaintiff, you shall like-
> wise return your verdict, in an equivalent amount,
> in favor of the defendant and against the third
> party defendant." (R. 51).

Counsel for appellant duly excepted to the court's failure to give this instruction:

> "I also except, your Honor, to the failure
> on the Court to give the Requested Instruction
> No. 15, which requires a directed verdict against
> the third party. * * *" (R. 52).

Following the entry of judgment upon the verdict, Shipowner (third party plaintiff, as against Stevedore), for judgment n.o.v. in accordance with its motion for a directed verdict (R. 67-69). This motion was denied by order of the District Court dated July 10, 1957 (R. 77).

[illegible] 3., 4. and 5. The District Court erred in failing to give defendant's requested instructions Nos. 10, 11, 21 and 22, respectively, as follows:

No. 10. "I instruct you that it is undisputed in this case that the platform sling being used by the stevedore company at the time of the plaintiff's accident was furnished and supplied by the stevedore company. I further instruct you that, for purposes of this case, the stevedore company is charged with knowledge of the condition of this platform sling. If you find, under the instructions I have given you, that the plaintiff is entitled to recover against the defendant vessel owner because this platform sling was inadequate or unseaworthy in not being equipped with a hook or other securing device to keep it from slipping, then I instruct you that the vessel owner is entitled to indemnity from the stevedore company as a matter of law and you will return your verdict accordingly." (R. 45)

No. 11. "If you find, under the instructions I have

given you, that the plaintiff is entitled to recover from the defendant vessel owner because the stowage of the cargo in question was such as to render the vessel unseaworthy, and if you further find that the employees of the stevedore company were aware of the method and manner in which the subject cargo was stowed but the stevedore company failed to stop work or to take steps to remedy such condition before proceeding with the discharge of cargo, then I instruct you that the vessel owner is entitled to indemnity from the stevedore company as a matter of law and you will return your verdict accordingly." (R. 67).

<u>No. 21.</u> "I instruct you that if the conditions surrounding the discharge of cargo from the subject vessel were such as to render the operations unsafe for the longshoremen performing such discharging services, then it was the duty of the stevedore company to stop such discharging operations when it reasonably appeared that to proceed would be unsafe. If you have based an award for the plaintiff upon a finding either that the improper stowage of cargo created an unsafe condition or that the use of a pick-up sling not equipped with a hook or other securing device created an unsafe condition and if you further find that the stevedore company knew or should have known of such unsafe condition or conditions and did not suspend or stop the discharging operations, then the failure of the stevedore company in such regard would constitute a breach of its duty and you should return your verdict in favor of the vessel owner on its third party indemnity claim." (R. 69).

<u>No. 22.</u> "I instruct you that although a vessel owner may be initially responsible for the creation or existence of an unseaworthy condition which renders the vessel unsafe for longshoremen who are required to work aboard, the stevedore company which has undertaken to load or discharge the vessel still owes the duty to the vessel owner, when it knows or has reason to know of the existence of such condition, to suspend or stop work until the same can proceed in safety. So in this case, if you find that the stevedore company knew or reasonably should

> have known of any unseaworthy condition which rendered it unsafe for its longshoremen employees to work aboard the vessel, its failure to suspend or stop operations until the work could safely resume would be a breach of its obligation to the vessel owner which would entitle the vessel owner to indemnity for any loss or liability which would not have occurred had the work been stopped. This is so even though the vessel owner may have been responsible initially for the unseaworthy condition which created the hazard. In other words, if a stevedore company brings an existing unseaworthy condition into play either by utilizing an unsafe method to discharge cargo or by continuing with work when it knows or should know that it is unsafe to do so, this will constitute a breach of its obligation owed to the vessel owner." (R. 70).

Counsel for Shipowner duly excepted to the failure of the court to give the foregoing Requested Instructions, as follows:

> "/I also except, your Honor, to the/* * * failure to give our Requested Instruction No. 18, regarding that if they find that the injury was caused by the misuse or use of a wrong pickup sling, then we are entitled to indemnity.
>
> "Failure to give our Requested Instruction No. 19, in which we ask the jury to be advised that if the stevedore company was aware of the method and failed to stop work, then we would be entitled to indemnity.
>
> * * *
>
> "No. 21, in which we ask that the jury be advised that under certain circumstances, they would have the obligation to stop work.
>
> "Now, 21 and 22, your Honor, I'm sure are somewhat repetitious. My exception goes to the failure of the Court to instruct the jury on the obligation of the stevedore company to stop work." (Tr. 299-300).

6. The District Court erred in failing to submit to the jury the special verdict form requested by Shipowner.

Shipowner requested that a special verdict form (R. 83-84) be submitted to the jury. The court, although commenting that the special verdict form was well prepared, declined to use it.

> "The Court: Well, I think that it is well-done, Mr. Carlsen. I would prefer a general verdict also. There are a lot less problems that arise after the jury goes out to deliberate, from my experience. We would seem to get along better with the general verdicts, which we are more used to." (Tr. 266).

Counsel for Shipowner duly excepted to the court's action in this regard:

> "Mr. Carlsen: First of all, your Honor, I except to the Court's failure to submit the special verdict form." (Tr. 297).

SUMMARY OF ARGUMENT

A. Plaintiff's claim against Shipowner

The trial court gave two instructions which were improper. One of these advised the jury that it might find liability against Shipowner because of "malfunctioning in the rigging used"--a form of unseaworthiness entirely unsupported by the evidence and, in fact, not even charged in the pleadings. The other erroneously told the jury that Shipowner could not delegate to Stevedore the performance of any of the

duties owed by Shipowner to shipboard workers (as distinguished from the responsibility therefor). In the context of the instant case, both these instructions were very probably misleading to the jury, to Shipowner's prejudice.

Additionally, the court below refused to give two instructions requested by Shipowner which related to plaintiff's charge that the vessel was unseaworthy because of improper stowage. These instructions set forth correct statements of the law, there existed a proper evidentiary basis for them in the record and their substance was not otherwise covered by any of the instructions given by the court. As a result, Shipowner was deprived of the right to have its theory of the case, in certain critical respects, presented to the jury by appropriate instructions.

B. Shipowner's indemnity claim against Stevedore

Shipowner was entitled to a directed verdict against Stevedore upon its indemnity claim. Any liability of Shipowner to plaintiff was necessarily predicated, as the issues were ultimately framed, upon unseaworthiness in one of two respects--either (1) improper stowage of cargo, which rendered the discharge operations unreasonably hazardous or (2) the use of a pick-up sling which was not equipped with a proper hook or other securing device to keep it from slipping . Under the evidence presented,

Shipowner is entitled to indemnity from Stevedore, as a matter of law, in either event.

It is undisputed that the pickup sling in question, together with the other gear used by the longshoremen, was furnished by Stevedore and that the entire discharging operation was conducted under the direction and control of Stevedore. Accordingly, if Shipowner's liability to plaintiff is based upon the use of the Stevedore furnished and controlled pickup sling, there can be no question as to Shipowner's right to indemnity.

The same result obtains if Shipowner's liability is based upon unseaworthiness resulting because the method of cargo stowage created unreasonable hazards or danger to those engaged in the work of unloading. The evidence again affirmatively shows that any such unseaworthiness was fully known to Stevedore at the very outset, notwithstanding which it took no steps to alleviate or eliminate the hazards or dangers presented, did not stop or discontinue the work and, by requiring its employees to continue with the unloading activities in the face of such hazards, brought such unseaworthy condition into play so as to cause plaintiff's accident and resulting injuries. Under these circumstances, the rule is clear that a vessel owner is entitled to indemnity from the master stevedore to whom the work is entrusted.

In any event, the trial court committed prejudicial error in refusing to give instructions requested by Shipowner which would have fairly presented its theory of the indemnity case to the jury. The court, in fact, gave none of the instructions requested by Shipowner which related the applicable law governing the rights between vessel owner and Stevedore to the particular facts of this case. The only instruction the jury was given on this phase of the case was the general charge that Stevedore had the duty to perform its work in a skillful, safe, and workmanlike manner and that if its failure to do so was the cause of plaintiff's accident then it must indemnify Shipowner. Due to the court's failure to give Shipowner's requested instructions, the jury remained entirely unadvised that Stevedore's warranty of workmanlike performance would be breached, and Shipowner entitled to indemnity, if the unseaworthiness upon which plaintiff's recovery is based consisted of the use by Stevedore of improper or unsafe appliances furnished by it, or if the Stevedore, with knowledge of an existing unseaworthy condition, nevertheless proceeded with the work and continued to subject its employees to the dangers presented, thereby "bringing into play" such unseaworthy condition. These points, of course, were vital to Shipowner's position and the failure to instruct the jury regarding them was necessarily prejudicial to Shipowner.

These errors were compounded by the court's refusal to submit the factual issues to the jury by means of a special verdict form--the practice strongly advised by this court and others in this type of case. The result is that there is no way now to determine what may have been the basis of the jury's ultimate findings.

ARGUMENT

A. Plaintiff's Claim against Shipowner

1. The trial court erred in giving plaintiff's Requested Instruction No. 7.

This instruction (set forth verbatim at page 6, supra) told the jury that "if the injuries to the plaintiff were caused by some malfunctioning in the rigging used for unloading the vessel" Shipowner would be liable to the plaintiff for unseaworthiness.

Malfunctioning in the rigging was not one of the specifications of unseaworthiness charged by plaintiff, nor was there any evidence that plaintiff's accident was caused by any such malfunctioning in the rigging. This instruction, in effect, advised the jury that it could make a finding of unseaworthiness on a specification neither alleged nor proved. It is, of course, error to permit the jury to make a determination of liability upon a specification not charged.

Carpenter v. Baltimore & O.R. Co. (CCA 6, 1940) 109 F2d 375

> "The appellee did not plead contributory negligence or assumed risk as a defense and no inference of either upon the part of appellant is found in his pleadings * * * and no issue is made upon these questions.
>
> "Applying the well-recognized rule that in determining the scope of instructions, the court must keep in mind the issues as made by the pleadings in the cause and that no instructions be given which tender an issue not supported by the pleadings, the court committed an error in submitting to the jury the issue of contributory negligence and assumed risk and in charging the jury that the fellow servant rule applied." (p 379).

Moreover, there being no support in the evidence for that portion of the instruction set forth above, the same is purely abstract and, at the very least, permitted the jury to indulge in speculation. This likewise constitutes error.

Dormaier v. Jessee (Or, 1962) 369 P2d, 131, 230 Or 194

> "The giving of instructions not supported by evidence permits the jury to speculate and is error. Layne v. Portland Traction Co., 212 Or. 658, 675, 319 P.2d 884, 321 P.2d 312; Prauss v. Adamski, 195 Or. 1, 15, 244 P.2d 598." (369 P2d, 133).

In a case such as this, involving relationships and terminology peculiar to the maritime and generally unfamiliar to the average layman, a substantial probability exists that an instruction with this vice may mislead the jury. In any event, it cannot be concluded with any

assurance that it did not.

2. The trial court erred in giving plaintiff's Requested Instruction No. 8.

This instruction (set forth verbatim at page 7, supra), speaking of the duties imposed upon shipowners with respect to the safety of employees, properly stated that such duties are nondelegable. However, it then went on to explain: "That is to say, the employer cannot delegate the performance of these duties to any other agent or employee * * * nor could it delegate the performance of them to * * * the stevedore company * * *."

This is an erroneous statement of the law. The court, in defining "nondelegable," mistakenly instructed that Shipowner could not delegate the performance of the duties in question to Stevedore or anyone else. Although it is true that the vessel owner cannot avoid the responsibility imposed upon it by such duties, there is no prohibition to the delegation of their performance. As there is no question but that Shipowner here did delegate the performance of the entire discharging operation to Stevedore, including those measures and precautions necessary for the safety of its employees, the instruction had the effect of advising the jury that Shipowner's conduct in this respect was prohibited by law. The culpability of Shipowner was thereby suggested at the outset and, when the plaintiff's

necessary that it was not).

The trial court erred in giving plaintiff's Requested Instruction No. 1.

"This instruction (set forth verbatim at page 7, supra), consisting of the duties imposed upon employers with respect to the safety of employees, properly states that these duties are nondelegable. However, it then goes on to say: 'That is to say, the employer cannot delegate the performance of these duties to any other agent or employee * * * and that if he delegates the performance of them to * * * the telephone company * * *.'

This is an erroneous statement of the law. The court, in defining "nondelegable," specifically instructed that the master could not delegate the performance of the duties in question to anyone else. Although it is true that the master cannot escape the responsibility imposed upon it by such duties, there is no prohibition on the delegation of their performance. In fact, it is to be realized that large businesses must all delegate the performance of the duties surrounding provision of elevators, including their operation and maintenance, necessary for the safety of its employees. The instruction had the effect of advising the jury that the company's conduct in this respect was prohibited by law. The culpability of Telephone was thereby enhanced in the minds of the jury, and thus the plaintiff's

accident thereafter occurred, the natural conclusion to be drawn by the jury is that Shipowner must necessarily be liable therefor.

3. <u>The trial court erred in failing to give Shipowner's Requested Instruction No. 24.</u>

This instruction (set forth verbatim at pages 7-8, supra) sets out a standard for determining whether a vessel is unseaworthy by reason of the method or manner of cargo stowage--i.e., "when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo." This is the standard contained in the instructions which were approved by this court in

<u>Blassingill v. Waterman Steamship Corp. (CA 9, 1964) 336 F2d 367</u>

and, it is submitted, is a correct statement of the law.

The latter part of the instruction, which states:

> "The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work."

relates the general standard to the particular facts of this case which are pertinent to Shipowner's theory of the case.

As this court stated in Blassingill, supra,

> "* * * a party is entitled to have his theory of the case presented to the jury by proper instructions, if there be any evidence to support it." (336 F2d 368)

The propriety of the trial court's instructions, of course, must be viewed in the light of the respective contentions of the parties and the evidence presented. Here, plaintiff claimed that the vessel was unseaworthy because (1) the cargo in question was not blocked, or "stickered," with dunnage of sufficient width to permit the regular cargo slings to be placed under the loads and that a "pickup" sling was therefore required to be used as a preliminary procedure and (2) the pickup sling being used was a "cradle" type, rather than a "choker" type which would have prevented the cargo from slipping.

The above requested instruction embodied one of the principal elements of Shipowner's theory of the case--i.e., that the cargo stow in question was in keeping with the usual and customary practice and that it did not pose any unreasonable risk of harm to the longshoremen engaged in the discharge if proper methods and equipment were utilized by the master stevedore.

There is ample evidence in the record to support this position. Witness Anderson, the supercargo who handled the JUDITH ANN, testified (Tr. 226) that the cargo was stowed properly and in the usual manner for ships

coming into Portland with the same type of cargo. Witness Finley, Stevedore's foreman, although indicating later in his testimony that it would have been safer had the cargo been blocked so as to allow the use of the main cargo slings in the first instance, testified that many ships carrying this type of cargo are stowed in the same fashion and that the only reservation he had as to the propriety of the stow was that it wasn't as <u>easy</u> to discharge (Tr. 241).

From the plaintiff's own witnesses it appears that whatever danger existed during the course of the discharge of this cargo was the direct result, not of the manner of stowage, but of the method and equipment used in the discharge operation. Witness Woods, one of plaintiff's fellow longshoremen, testified that a choker type sling is usually used under the circumstances here present, that such choker sling could have been used, that its use is preferred and that if a choker type pickup sling had been used on the load in question the result would have been different.

Witness Cowan, another of plaintiff's fellow longshoremen, similarly testified that Stevedore did not provide their gang with a choker type pickup sling (Tr. 165), that the choker type sling could have been used in place of the cradle type which was used (Tr. 167), that the choker type would have "choked" the steel because of the

increased friction (Tr. 167-168) and that if they had been furnished the choker type sling they would have used it (Tr. 169). As he stated, referring to the cradle type pickup sling:

> "Well, we really don't like to pick the steel up with a pickup sling <u>of that type</u>." (Emphasis supplied) (Tr. 156).

Cowan also indicated that the proper method of utilizing the cradle type pickup sling--and the method which was being used for this cargo--was to pick the load up only a <u>very few inches</u> with the pickup sling, and then to block it with a 4 x 4 so that the main cargo sling could then be put around the load:

> "We avoid going very high with this load, with this type of sling. The pickup--oh, if we can get by, we pick up only a few inches and block it.
>
> * * *
>
> "We only pick up a very few inches and block this load due to the danger of this slipping." (Tr. 156).

It is obvious, even to a layman, that if this method had been used, instead of raising the load three or four feet in the air and attempting to affix the main cargo sling (or, as Witness Rensklev indicated was being done, to place a block) while the load of steel hung thus suspended, the hazard which led to plaintiff's injury would have been entirely eliminated.

Additionally, Cowan testified that the unloading method being employed in this instance--i.e., using the cradle type pickup sling in the manner described--was not the only practical way to discharge this cargo and that the use of the ship's winch, rather than a dockside crane, would have made it "much easier to control picking the loads up" (Tr. 162).

Witness Anderson, supercargo, testified that he handles steel ships as often as two to three times a month. He stated that he has never seen cargo of steel reinforcing bars stowed with 4 x 4 blocks (Tr. 234). He testified that the customary method for placing slings around the bundles of steel bars is by prying up the ends and putting in blocks (Tr. 234).

It is again obvious that if such method had been used in this instance the hazard which led to plaintiff's accident would never have arisen.

Thus, there is evidence in the record that alternative methods were available to unload the cargo in question and that such methods, had they been used, would have minimized or eliminated the hazard which led to plaintiff's injury. Accordingly, Shipowner was entitled to have its theory of the case presented by means of its requested instruction.

It should be further noted that the court's

failure to give this instruction was particularly harmful to Shipowner's position, as the court nowhere else in its instructions gave the jury a meaningful standard by which to determine whether or not the stowage in this instance was seaworthy. The only instruction which in any way attempted to set forth such a standard for the jury's guidance advised simply that Shipowner had a duty to maintain the stowage in a seaworthy condition, which was defined to be "a condition reasonably suitable and fit for the purpose or use for which provided or intended" (Tr. 276). This may be adequate when the matter in question is the seaworthiness of the ship, or its gear or appliances, but it obviously does little to enlighten a layman concerning a shipowner's duties, as regards cargo stowage, to longshoremen

The overall result is that the court's instructions have failed altogether to advise the jury that a finding of unseaworthy stowage must be based upon a finding that the stow in question caused an unreasonable risk of harm to plaintiff. This is a void which the requested instruction, following Blassingill, would have filled.

4. The trial court erred in failing to give Shipowner's Requested Instruction No. 25.

This instruction (set out verbatim at page 8, supra) would have told the jury that a vessel is not

rendered unseaworthy simply because its cargo is stowed in such manner as to require the use of a pickup sling in order to discharge it.

Shipowner requested this instruction in line with its theory that the cargo stowage here in question was not the source of the danger which led to plaintiff's accident and that, if any undue hazards were presented during the unloading operations, they were created by the discharge method and appliances chosen by Stevedore.

There was no evidence presented which would support the proposition that the employment of any type of pickup sling, under any and all circumstances and no matter how carefully used or what precautions taken, creates an unreasonable risk or hazard.

On the contrary, reference has hereinabove been made to the evidence which tends to show that the cradle type pickup sling here being employed could have been used (by lifting the load only a few inches and placing blocks underneath it) in a manner which would have, without question, avoided plaintiff's accident. Attention has also been directed to the testimony concerning the choker type pickup sling which likewise could have been used without the danger which accompanied Stevedore's method of using the cradle type sling. Moreover, the testimony of practically all the witnesses establishes that pickup slings of the types mentioned are standard and well known appliances used

with considerable frequency on the waterfront. It is doubted that anyone would seriously contend that any time any such slings are used in connection with the discharge of cargo, and regardless of the circumstances, the vessel then and there becomes unseaworthy.

It is submitted that the instruction requested is a correct statement of the law and that, under the evidence presented, Shipowner was entitled to have the jury so instructed as part of the presentation of its theory of the case.

B. Shipowner's Indemnity Claim against Stevedore

1. The trial court erred in denying Shipowner's motions for directed verdict and for judgment n.o.v. against Stevedore.

At the close of all the evidence, Shipowner moved for a directed verdict in its favor upon its indemnity claim against Stevedore on the ground that any liability on its part to plaintiff was, as a matter of law, caused by the breach of Stevedore's warranty of workmanlike service (Tr. 256-257, 259-260). Additionally, an instruction (Shipowner's Requested Instruction No. 17) was requested for the same purpose (R. 65). After the entry of judgment, Shipowner duly moved for judgment n.o.v., as against Stevedore, in accordance with its motion for a directed verdict. Under the evidence

presented in this case, and the governing rules of law, it is clear that Shipowner's motions should have been granted.

As has been shown, Shipowner's liability to plaintiff is necessarily predicated upon unseaworthiness in one of two respects--either (1) improper stowage of cargo, which rendered the discharge operations unreasonably hazardous, or (2) the use of an unsafe pickup sling. Because of the court's refusal to submit the factual issues to the jury by means of a special verdict form, it cannot be ascertained whether the jury's finding of unseaworthiness is based upon one or the other of these charges, or both. However, the evidence requires an award of indemnity to Shipowner in either case.

The following facts are undisputed: The discharging operation was being performed under the express direction and control of Stevedore (Agreed Facts, pretrial order, R. 12); Stevedore, by its written contract, was required to furnish all necessary labor and supervision and all ordinary gear, including usual appliances used for stevedoring (Ex. 31); the pickup sling being employed by Stevedore on the load of steel reinforcing bars at the time of plaintiff's accident was, in fact, furnished by Stevedore (Tr. 84); Stevedore, not only through the longshoremen working in the hold, but through its foreman, was fully aware of the condition of the cargo, including

the method and manner of stowage, prior to plaintiff's accident (Tr. 240) and of the method being used to discharge the cargo (Tr. 238-239); and the longshoremen working in the hold had made known to their boss their complaints concerning the manner of stowage and the method of discharge being utilized (Tr. 71, 88, 159).

If Shipowner's liability to plaintiff is based upon the use of the cradle type pickup sling being employed at the time of plaintiff's accident, it is axiomatic that indemnity must be allowed. The authorities hold with virtual unanimity that where the unseaworthiness which results in liability to a vessel owner stems from the use of unsafe appliances furnished by the stevedore, or employment by the stevedore of an unsafe method of operation, the stevedore's warranty of workmanlike service is breached and the vessel owner is entitled to indemnity.

<u>Italia Societa v. Oregon Stevedoring Company, Inc.
(1964) 376 US 315, 84 S Ct 748, 11 Led2d 732</u>

In that case, the vessel owner was found to be liable to a longshoreman who was injured because of a defective rope. In the vessel owner's action against the stevedore for indemnity, the District Court ruled in favor of the stevedore because there was no showing of negligence on the stevedore's part. This court affirmed and the issue was then taken to the United States Supreme

Court on petition for certiorari. The Supreme Court held that the vessel owner was entitled to indemnity even though there was no showing of negligence or fault on the stevedore's part.

> "Oregon, a specialist in stevedoring, was hired to load and unload the petitioner's vessels and to supply the ordinary equipment necessary for these operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by Oregon, and the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon. Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations. Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and extends to those who perform the unloading and loading portion of the ship's work, Seas Shipping Co. v. Sieracki, 328 US 85, 90 L ed 1009, 66 S Ct 872, cf. Pope & Talbot v. Hawn, 346 US 406, 98 L ed 143, 74 S Ct 202, they demonstrate that Oregon was in a far better position that the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company." (Emphasis supplied) (376 US 322-323)

If a stevedore must indemnify a ship owner because of the use of an unsafe appliance when there is no negligence or fault on the stevedore's part, it is an *a fortiori* proposition that indemnity must be allowed where there is nothing latent about the danger and any impropriety in the use of the appliance must have been

known to the stevedore.

This court, in the quite recent case of

Rederi A/B Nordstjernan v. Crescent Wharf & Warehouse Co. (CA 9, 1967) 372 F2d 674

held that indemnity in favor of a vessel owner should have been awarded as a matter of law where the stevedore company utilized an unsafe method of discharging cargo and, with knowledge of the hazards presented, failed to discontinue the work.

> "The third-party complaint for indemnity was an action for breach of the stevedore's warranty of workmanlike service. Counsel for appellee stevedoring company admitted that appellee had breached its contract in two respects, failing to stop work and using an unsafe method to discharge the cargo. (R.T. pp. 281-82). Certainly had it ceased work the injury would not have occurred. Reasonable men could not differ that it was the admitted failings of appellee which brought into play the unseaworthy condition of the vessel to cause the injury. Appellant was entitled, as a matter of law, to judgment of indemnity, and the district court erred in not granting that judgment." (Emphasis supplied) (page 677).

It is true that there the stevedore company admitted that it had breached its warranty of workmanlike service. However, if the verdict in favor of the plaintiff in the instant case is based upon unseaworthiness resulting from the use of the pickup sling, the verdict establishes conclusively the same breach that was admitted in the above case--"using an unsafe method to discharge the cargo."

Mosley v. Cia. Mar. Adra S.A. (CA 2, 1966)
362 F2d 118

In this case, the plaintiff longshoreman was awarded damages against the shipowner because of injuries received while loading the latter's vessel. The District Court awarded indemnity against the stevedore by granting the shipowner's motion for judgment n.o.v. after a jury verdict in favor of the stevedore on the indemnity issue. The Court of Appeals affirmed, stating:

> "On the merits of the n.o.v. motion, the trial judge ruled that 'any seaworthy condition obtaining in the 'tween deck area was created by the stevedore * * *.' A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See Mortensen v. A/S Glittre, 348 F.2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 318-324, 84 S.Ct. 748, 11 L.Ed.2d 732 (1964); Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 428-429, 79 S.Ct. 445, 3 L.Ed.2d 413 (1950); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133-134, 76 S.Ct. 232, 100 L.Ed. 133 (1956)." (Emphasis supplied) (page 122)

A similar holding is found in

DeVan v. Pennsylvania Railroad Company (DC, Pa, 1958)
167 F Supp 336

where the shipowner's liability to an injured longshoreman resulted from the use of an unsuitable cargo hook in connection with the loading of pipe. The shipowner was

awarded indemnity against the stevedore because, as the court found, the hook in question had been furnished by the stevedore and the method and manner of loading the pipe was under the supervision and direction of the stevedore.

> "Since the cargo hook was supplied by Independent Pier Company pursuant to its obligation under the second paragraph of Section 3 of the agreement of April 17, 1954, and Independent's breach of its implied warranty of performing the loading in a workmanlike and safe manner is the substantial cause of the liability of Grace Line, Inc., as stated in Conclusion of Law 3 above, Grace Line, Inc., is entitled to indemnity against Independent Pier Company for the entire amount of such liability. See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 2d 491." (page 344).

The same result is reached if shipowner's liability to plaintiff is predicated upon the unseaworthiness charge of improper stowage. As shown above, there was nothing about the manner of stowage or the condition of the cargo, and any hazards or danger thereby presented, which was not fully known to stevedore. Nevertheless, stevedore took no steps to alleviate or eliminate such hazards, nor did it stop or discontinue the work. Rather, it required its employees to continue with the unloading, using the same procedures and equipment and exposed to the same hazards. It thereby brought any unseaworthy condition which existed into play.

The law is again clear that, under such circumstances, shipowner is entitled to indemnity as a matter of law.

Since the rule was first announced in

Crumady v. "Joachim Hendrik
Fisser" 358 US 423, 79 S Ct
445, 3 Led2d 413

the courts have consistently held that where a stevedore, with knowledge of an existing unseaworthy condition aboard a vessel, continues with its work and takes no steps to reduce or eliminate the danger presented or to have the ship do so, it must indemnify the shipowner for liability resulting when one of the stevedore's employees is thereafter injured during the course of such work.

Rederi A/B Nordstjernan v. Crescent Wharf &
Warehouse Co. (CA 9, 1967) 372 F2d 674

In that case, as in the instant case, the plaintiff longshoreman sought damages for injuries sustained while unloading the defendant's vessel and the defendant impleaded the stevedore company on a third party complaint seeking indemnification. There, as here, the plaintiff claimed that the cargo had been improperly stowed and that an unsafe method of discharging was utilized. In a jury trial, the plaintiff obtained a verdict against the shipowner, but the shipowner was denied indemnity against the stevedore company. On appeal, this court reversed, holding that the shipowner

was entitled to indemnity as a matter of law because the stevedore company "brought into play the unseaworthy condition of the vessel to cause the injury."

It may be argued that the case is distinguishable because there the stevedore admitted that its failure to stop work constituted a breach of its warranty of workmanlike service. However, in the instant case it is admitted that stevedore failed to stop work and, if the condition of the cargo was such as to create an unreasonable hazard to the longshoremen (as it must have been in order for the jury to make a finding of unseaworthiness on the stowage charge), the stevedore had a clear duty to stop work and its failure to do so constituted a breach of its warranty of workmanlike service. Accordingly, the following language of this court is eminently apposite:

> "The third-party complaint for indemnity was an action for breach of the stevedore's warranty of workmanlike service. Counsel for appellee stevedoring company admitted that appellee had breached its contract in two respects, failing to stop work and using an unsafe method to discharge the cargo. (R.T. pp 281-82). Certainly had it ceased work the injury would not have occurred. Reasonable men could not differ that it was the admitted failings of appellee which brought into play the unseaworthy condition of the vessel to cause the injury. Appellant was entitled, as a matter of law, to judgment of indemnity and the district court erred in not granting that judgment." (page 677).

Matson Terminals, Inc. v. Caldwell (CA 9, 1965)
354 F2d 681

This was an action by a vessel owner against a stevedore for indemnity on account of liability incurred to a longshoreman who was injured by reason of a defective winch. Under the stevedoring contract, the vessel owner had the duty to supply adequate winches in good working order, which it failed to do. Despite the fact that the unseaworthiness which led to the longshoreman's injury was attributable to the ship in the first instance, this court affirmed an award of indemnity to the vessel owner because the stevedore, after learning of the defect in the winch, nevertheless proceeded with the work. Indemnity was allowed even though the stevedore had called the vessel owner's attention to the winch's unsatisfactory condition prior to the accident.

> "It is to be noted that competence and safety are the essence of the implied obligation of the stevedore to render workmanlike service. Matson was in charge of the stevedoring operations. It is a specialist in that field. Having early secured knowledge of the defective winches, and having continued to use them until Caldwell was injured, with no satisfactory evidence that the unsatisfactory condition had been remedied, falls short of that standard of expertise embodied in its implied obligation to furnish workmanlike service. In our view, in light of the circumstances of this case, the conduct of Sea-Land did not constitute such material breach of its contract so as to preclude it from enforcing the contract of indemnity. Petus v. Grace Line, Inc., supra." (page 686).

A case quite analogous on its facts to the instant case is

Caputo v. U.S. Lines Company (CA 2, 1963) 311 F2d 413, cert. denied, 374 US 833, 83 S Ct 1871, 10 Led 1055

At the trial level, the longshoreman plaintiff was awarded damages against the shipowner because of injuries resulting from the dangerous condition of stowage of cargo, but the stevedore company prevailed on the shipowner's indemnity claim. On appeal, the court held that the finding of improper stowage, together with the established fact that the stevedore continued with its work in the face of such dangerous condition, required a reversal and an award of indemnity to the shipowner.

> "The testimony was that the allegedly dangerous condition of the stowage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity."(Emphasis supplied) (page 415).

A similar holding is found in

T. Smith & Son, Inc. v. Skibs A/S Hassel (CA 5, 1966) 362 F2d 745

Here a shipowner was held liable to a longshoreman who was injured when he fell into the lower hold because of an ill fitting hatch board. Indemnity over against the stevedore was approved, despite a finding of negligence on the part of the shipowner, because the stevedore continued with the work after acquiring

knowledge of the defective hatch board.

> "There is a related rule that defects which are in fact observed cannot be overlooked. If the stevedore has knowledge of a defect it should correct it or require it to be corrected by the ship's officers. Smith v. Jugosalvenska Linijska Plovidea, 4th Cir. 1960, 278 F.2d 176; Santomarco v. United States, 2nd Cir. 1960, 277 F.2d 255, cert. den. American Stevedores, Inc. v. United States, 364 U.S. 823, 81 S.Ct. 59, 5 L.Ed.2d 52. The defects in the hatch board in this case were known to several of Smith's employees who were members of the same gang as Duvernay, the injured longshoreman. Knowledge of an employee of the stevedore will constitute notice to the employer, and the actual knowledge need not be that of a supervisory employee. Nicroli v. Den Norske Afrika-OG Australielinie, etc., 2nd Cir. 1964, 332 F.2d 651. The stevedore gang had been on the vessel about thirty minutes and the defect was discovered about fifteen minutes before the accident. We cannot adopt Smith's theory that the shortness of these time intervals relieves it of the consequences of its warranty. We do not decide whether or not the longshoremen of Smith should have repaired the defective hatch board. Perhaps their duty was to see that ship's personnel corrected the defect. We think it is clear that it was a breach of Smith's warranty for them to work over the hatch with knowledge of the dangerous condition." (Emphasis supplied) (page 747)

A leading case involving the rights and duties as between a shipowner and master stevedore is

Hugev v. Dampskisaktieselskabet International (DC Cal, 1959) 170 F Supp 601

In this case Judge Mathes, after an exhaustive analysis of the shipowner-stevedore relationship, concluded that it is a breach of the stevedore's warranty of workmanlike service to continue with loading or unloading

operations after it is aware that conditions exist which make it unsafe to do so, even though the dangerous condition was created by the vessel. The following language taken from this decision is pertinent to the case at bar:

> "The stevedoring company's implied-in-fact contractual obligation to perform its duties with reasonable safety embraces not only the handling of cargo, but 'the use of equipment incidental thereto' as well. 355 U.S. at page 567, 78 S.Ct. at page 441. It includes also the duty to suspend the loading or unloading operations on its own initiative, and thus to avoid injury or damage, whenever the stevedore realizes that it would be unsafe under the circumstances to proceed." (Emphasis supplied)(page 608)

* * *

> "In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taking thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts throughout the world." (Emphasis supplied)(page 609)

* * *

> "The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the

> stevedoring operations are thereby delayed, the shipowner normally must pay for standby time." (Emphasis supplied (page 610).

(The above case was affirmed by this court, sub. nom. Metropolitan Stev. Co. v. Dampskisaktieselskabet Int. (CA 9, 1960) 274 F2d 875, cert. denied 363 US 803, 80 S Ct 1237, 4 Led2d 1147).

Another case analogous to the instant case is Simpson v. Royal Rotterdam Lloyd (DC NY, 1964) 225 F Supp 947 where the plaintiff longshoreman sought damages for injuries allegedly caused by improper and unsafe stowage. As in the present case, the evidence indicated that complaint had been made to the hatch boss concerning the condition of the hold and cargo. It further appeared that this condition was actually called to the attention of one of the ship's officers. Nevertheless, the court allowed the shipowner's claim for indemnity because the stevedore, after acquiring knowledge of the unsafe condition, continued to unload the vessel.

> "I conclude that Stevedore in this case breached its obligation to Shipowner to perform its services in a workmanlike manner. Although it has been held that there is no duty on the part of a stevedore to inspect a vessel prior to beginning work, Orlando v. Prudential S.S. Corp., 313 F2d 822 (2 Cir. 1963), once a stevedore has knowledge of an unsafe condition, there is an obligation upon the stevedore either to remedy the condition or to cause the ship to do so. (Emphasis supplied) (page 652)

* * *

[illegible] [illegible] of the plaintiff [illegible]
[illegible] [illegible] [illegible]
[illegible] (Emphasis supplied [illegible])

(The same rule was followed in this case [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] on a [illegible] quality.)

Neither case [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

where the plaintiff [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible]. As in the present case, the evidence [illegible] that complaint had been made to [illegible] [illegible] [illegible] the [illegible] [illegible] the [illegible] and [illegible]. [illegible] [illegible] that this condition was generally [illegible] to the [illegible] of [illegible] [illegible] the [illegible] [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] because the [illegible], [illegible] [illegible] [illegible] of the [illegible] [illegible], [illegible] to [illegible] the [illegible].

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

* * *

> "This obligation of a stevedore includes ordinarily the duty not to continue work until a known dangerous condition has been made reasonably safe. (Emphasis supplied)(page 952)

* * *

> "Stevedore breached its obligation to perform a workmanlike job by continuing to unload the cargo in the condition it was in. Merely showing the unsafe condition to the ship's officer was not sufficient to discharge the obligation of Stevedore, unless the condition was remedied." (Emphasis supplied)(page 953)

This decision is of particular interest because the stevedoring contract, as in the case at bar (Ex. 31, Sections IX G and H), contained provisions for extra compensation to the stevedore in the event the cargo was not in good order and extra care or effort was needed in order to effect discharge. As the court stated:

> "The contract in this case between Shipowner and Stevedore expressly contemplates that cargo may arrive for unloading not in customary good order, in which event Stevedore would be entitled to additional compensation for the extra care and manpower needed to discharge the cargo. The inclusion of an express clause concerning varying conditions in the stow negates any inference of an implied warranty as to the safety of the stow." (page 954).

Nordeutsher Lloyd, Brennan v. Brady-Hamilton Steve. Co. (DC Or, 1961) 195 F Supp 680

This is another case which is very similar on its facts to the instant case. The shipowner sought indemnity from the stevedore for liability incurred to an injured longshoreman because of improper stowage of cargo. Judge Kilkenny, in awarding indemnity to the

[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]. (Appendix page [illegible])(Page 270).

* * *

"Therefore, [illegible] [illegible] obligation to perform [illegible] was [illegible]." (Appendix page [illegible])(Page 271)

This decision is of particular interest because the shipbuilding contract, as in the case at bar (Sec. 15, sections 12 and 13), contained provisions for extra compensation to the contractor in the event the delay was not in good [illegible] and [illegible], [illegible] was needed in order to [illegible] [illegible]. As the Court stated:

"The [illegible] of the [illegible]." (Page 271).

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

This is another case which is very similar on all points to the instant case. The shipowner sought [illegible]

shipowner, stated:

> "The respondent's duty under its contract with the libelant included the duty to suspend the loading or unloading operation of its own initiative and thus avoid injury or damage whenever it realized that it would be unsafe to proceed. United States v. Arrow Stevedoring Co., 9 Cir., 1949, 175 F.2d 329, certiorari denied 338 U.S. 904, 70 S.Ct. 307, 94 L.Ed. 557. (page 683)
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> * * *
>
> "The evidence is clear that the stowage of the crates of glass on the bundles of pipe was improper, that respondent had notice of the dangerous place in which Ough and his fellow workman were compelled to work and that nothing worthwhile was done to protect the men from the hazards of unloading this dangerous cargo. (Emphasis supplied)(page 683)
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> * * *
>
> "Respondent argues that the judgment in the primary case is not conclusive, in that the specifications of unseaworthiness and negligence in such case related solely to the manner in which the vessel was loaded and that the respondent, as the contracting stevedore, could not be held responsible for those charges. I have already found that respondent was fully aware of the dangerous place in which Ough was required to work. Respondent breached its duty whenever its action brought into play the unseaworthiness of the vessel. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 81 S.Ct. 200, 5 L.Ed.2d 169; Crumady v. The Joachim Hendrik Fisser, supra." (Emphasis supplied) (pages 684-685).

A good statement of one of the underlying considerations for the rule expressed in the foregoing case is found in

Pacific Far East Line v. California Stevedore & Ballast Co. (DC Cal, 1965) 238 F Supp 956

There the shipowner sought indemnity against the stevedore for liability incurred to a longshoreman who was injured as a result of oil leakage on the deck passageway. The shipowner contended that the stevedore breached its warranty "by continuing to work its stevedoring crew under an unsafe, unseaworthy condition aboard a ship of which condition the respondent had knowledge." The court granted indemnity to the shipowner, stating:

> "The great weight of authority allows a shipowner to recover indemnity from a stevedore company which proceeds to work its crew under an unsafe, unseaworthy condition of which the stevedore company has knowledge. The reasoning is that such conduct of the stevedore company brings the unseaworthiness of the ship into play and amounts to a breach of the stevedore's warranty of workmanlike service. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959). See, in this Circuit: United States v. Rothschild International Stevedoring Co., 183 F.2d 181 (9th Cir. 1950); American President Lines v. Marine Terminals Corporation, 234 F.2d 753 (9th Cir. 1956); Hugev v. Dampskisaktieselskabet International, 170 F.Supp. 601 (S.D. Cal. 1959), affirmed, 274 F.2d 875 (9th Cir. 1960). (page 958).

* * *

> "We are of the opinion that the majority rule is preferable because it furthers the primary considerations of avoidance of accidents. The possibility of indemnity over against it by the shipowner will cause a stevedore company to hesitate before risking its crew in an unsafe, unseaworthy condition--as it might do if it could do so with impunity. Presumably, a shipowner, even one whose ship in some respect subjects it to an absolute liability for unseaworthiness, would prefer that work be stopped rather than the condition be "brought into play" by the stevedore

> company to the injury of a worker. The stevedore company's warranty of proper workmanship is broad enough to imply that it will not proceed in the face of a known, dangerous condition. Its clear obligation is to either remedy the condition, or have the ship remedy it or, if necessary, refuse to subject workers to the risk of injury--an obligation analogous to the obligation to exercise the 'last clear chance' as recognized by the law of torts." (Emphasis supplied)(page 959)

The testimony of Stevedore's walking boss Cecil Finley (Tr. 239) to the effect that the method of discharge being used was the "most proper" and "the only practical way" provides no basis for arguing that the Stevedore's duties, as set out in the foregoing authorities, were somehow lessened in this case. In the first place, the evidence heretofore reviewed demonstrates beyond doubt that, if the method being used was unduly hazardous, there were other methods available which could have reduced the risk. In any event, even if it is assumed that there was absolutely no other method of discharging this cargo than that which was employed, Stevedore still had the duty to discontinue the work if its employees were thereby exposed to an unreasonable risk of harm.

Crescent Wharf & Warehouse v. Compania Naviera De Baja Calif. (CA 9, 1966) 366 F2d 714

> "If, as contended by Crescent, there was no other method or means of loading the vessel than the one employed, then we do not believe Crescent was justified in carrying on a loading operation which it knew to be dangerous. It was aware of the possibility of a flange being pulled loose. The procedures of loading prior

> to the time the flange was hammered back and subsequent thereto were not changed. The loading gear still continued to catch or strike the metal flange the same as it had prior to the stoppage of work. There was no attempt to avoid the known danger by the use of another method or stopping the work until it could be definitely determined that there was no danger from the catching and rubbing of the gear on the flange." (Emphasis supplied)(page 719)

It thus appears, from the undisputed evidence and the most explicit pronouncements of this and other courts which have considered the identical issue, that Shipowner is entitled to indemnity in this case.

2. The trial court erred in failing to give Shipowner's Requested Instructions Nos. 18, 19, 21 and 22.

In the event it should be determined that Shipowner is not entitled to indemnity as a matter of law as urged hereinabove, it becomes necessary to examine the propriety of the trial court's rulings with respect to certain of the instructions requested by Shipowner on the indemnity issue.

These instructions (set out verbatim at pages 10-12, supra) would have advised the jury as follows:

No. 18. That if the jury should find against Shipowner because the Stevedore-furnished pickup sling was inadequate or unsafe, as charged by plaintiff, then Shipowner would be entitled to indemnity.

No. 19. That if the jury should find against Shipowner because of unseaworthy stowage and if the jury further should find that Stevedore

was aware of the manner of stowage but failed to stop work or remedy the condition before proceeding with the discharge, then Shipowner would be entitled to indemnity.

No. 21. That if the conditions surrounding the discharge rendered the operations unsafe it was the duty of Stevedore to stop such operations when it reasonably appeared that to proceed would be unsafe; that if the jury should find that Stevedore knew or should have known of such unsafe conditions and did not suspend or stop the discharge operations, then Shipowner would be entitled to indemnity.

No. 22. That although a shipowner might be initially responsible for an unseaworthy condition, a stevedore which has undertaken to discharge cargo still owes the duty to the shipowner, when it knows or has reason to know of such unseaworthy condition, to suspend or stop work until the work can proceed in safety; that if the jury should find that Stevedore knew or should have known of any unseaworthy condition which rendered it unsafe to work, its failure to suspend or stop work until it could safely resume would entitle Shipowner to indemnity for any liability which would not have occurred had the work been stopped; that if a stevedore brings an existing unseaworthy condition into play either by utilizing an unsafe method or by continuing when it knows or should know that it is unsafe to do so, its obligation to the shipowner is thereby breached.

Shipowner can only state that these instructions embody correct statements of the law, as reflected by the authorities hereinabove set forth, and that the court's failure to give them (assuming, arguendo, that Shipowner was not entitled to prevail on the indemnity claim as a matter of law) obviously deprived it of the right to have its theory of the case presented to the

jury by proper instructions. As pointed out earlier, this is prejudicial error under the rule in

> Blassingill v. Waterman Steamship Corporation (CA 9, 1964)
> 336 F2d 367, 368

It has been held to be reversible error not to give instructions similar to these in a maritime indemnity case of this type.

Dziedzina v. Dolphin Tanker Corp.(CA 3, 1966)
361 F2d 120

> "Here specifically it was incumbent upon the court to point out that knowledge of the unseaworthy condition in Dolphin did not defeat its right of indemnity against Atlantic. The court also had the duty to explain to the jury that even if the stevedore acts in a non-negligent manner, his warranty of workmanlike service is breached where such actions make the unseaworthiness of the vessel operative. These principles of Maritime Law are unique and distinct from the Common Law standards and for this reason, the District Court must be explicit; such was not the case here.
>
> * * *
>
> "Finally the court below failed to adequately cover in its general charge point #9 requested by Dolphin. The thrust of this point was aimed at making the jury aware that the right of indemnity exists where a preexisting condition of unseaworthiness was brought into active play by the action of the stevedore. The import of this point is obvious under the factual circumstances of this case." (Emphasis supplied)(page 123).

The trial court's failure to give these requested instructions, coupled with the fact that the only instruction which was given with respect to Stevedore's obligations to Shipowner was simply the general charge that Stevedore had the duty to perform its work in a skillful, safe and workmanlike manner, resulted in the jury's being left entirely unadvised on the points which were really critical to the indemnity claim. The jury received no instruction whatever on such pivotal matters as Stevedore's duty to furnish safe appliances and utilize safe methods, its duty to stop work in the face of unduly hazardous conditions, whether or not the same were created by Shipowner, and the "bringing into play" doctrine.

Shipowner submits that this falls far short of being a fair presentation of its theory of the case.

3. The trial court erred in failing to submit the factual issues to the jury by means of the requested special verdict form.

Shipowner requested that the court utilize a verdict form consisting of special interrogatories (R. 83-84). The court, indicating that general verdicts were preferable, declined to do so (Tr. 266).

It is recognized that the choice of verdict form is a matter within the trial court's discretion and that, ordinarily, a court's decision in this respect would

not constitute error. However, it was felt, in view of this court's rather strong admonition in

Koivunen v. States Line
(CA 9, 1967) 371 F2d 781, 783

concerning the desirability of special interrogatories in this type of case, together with the lack of explicit direction to the jury reflected in the instructions as a whole, that this was perhaps that exceptional case where the use of a general verdict would be error.

CONCLUSION

Based upon the propositions and authorities set forth hereinabove, Shipowner respectfully urges:

1. The judgment below in favor of plaintiff and against Shipowner should be vacated and a new trial ordered as between plaintiff and Shipowner.
2. The judgment below in favor of Stevedore and against Shipowner should be reversed and judgment entered in favor of Shipowner on its indemnity claim.
3. In the event the court determines that Shipowner is not entitled to entry of judgment on its indemnity claim, the

indemnity case should be remanded for new trial.

Respectfully submitted,

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APPENDIX

EXHIBIT No.	OFFERED	IDENTIFIED	RECEIVED
1A	Tr. 54-55	Tr. 55	Tr. 57*
1D	Tr. 54-55	Tr. 55	Tr. 57*
1E	Tr. 54-55	Tr. 55	Tr. 57*
1F	Tr. 54-55	Tr. 55	Tr. 57*
1H	Tr. 54	Tr. 54	Tr. 54
2	Tr. 40	Tr. 40	Tr. 40
4	Tr. 7	Tr. 7	Tr. 7
5	Tr. 59	Tr. 59	Tr. 59
31	Tr. 236	Tr. 236	Tr. 236
32A	Tr. 248	Tr. 248	Tr. 249
32B	Tr. 248	Tr. 248	Tr. 249

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*Objection to admission of exhibit overruled.